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10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
12 AT TACOMA

13 CAMERON PIERCE and PATRICIA
14 PIERCE, husband and wife; KAREN KIRBY,
15 a single woman; GREGORY SHERMAN and
16 PAULA SHERMAN, husband and wife,
17 MICHAEL LEPAGE and GERTRUDE
18 LEPAGE, husband and wife; on behalf of
19 themselves and a class of similarly situated
20 individuals,

21 Plaintiffs,

22 v.

23 NOVASTAR MORTGAGE, INC., a foreign
24 corporation,

25 Defendant.

26 CASE NO. C05-5835RJB

ORDER (1) DENYING
DEFENDANT NOVASTAR
MORTGAGE, INC.'S MOTION
FOR COMPULSORY JOINDER,
(2) GRANTING PLAINTIFFS'
AMENDED MOTION TO
DESIGNATE TWO
ADDITIONAL CLASS
REPRESENTATIVES, (3)
AMENDING CAPTION, (4) AND
DENYING DEFENDANT
NOVASTAR MORTGAGE,
INC.'S MOTION TO CONTINUE
TRIAL DATE

This matter comes before the Court on Defendant NovaStar Mortgage, Inc.'s Motion for Compulsory Joinder of Absent Persons as Defendants (Dkt. 195), Plaintiffs' Amended Motion to Designate Two Additional Class Representatives (Dkt. 200, amending Dkt. 192), and Defendant

ORDER
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1 NovaStar Mortgage, Inc.'s Motion to Continue Trial Date (Dkt. 197). The Court has considered
 2 the pleadings filed in support of and in opposition to the motions and the remainder of the file
 3 herein.

4 **I. FACTUAL AND PROCEDURAL BACKGROUND**

5 The class plaintiffs are all borrowers who engaged in loan transactions with NovaStar
 6 Mortgage, Inc. ("NovaStar Mortgage") and claim to have been deceived by NovaStar
 7 Mortgage's failure to adequately disclose its payment to brokers on good faith estimates. The
 8 plaintiffs brought suit alleging that the failure to provide written disclosure of these payments
 9 resulted in higher interest rates on their loans and violated Washington's Consumer Protection
 10 Act ("CPA"), 19.86 *et seq.*

11 On April 19, 2007, the Court amended the class definition to read as follows:

- 12 (1) You entered into a federally-regulated mortgage loan that was subject to the
 requirements of Washington law and secured by property within the State of Washington,
 at any time from December 30, 2001, to the present;
- 13 (2) NovaStar paid money to your mortgage broker ("Payment") in return for negotiating
 a higher interest loan for you;
- 14 (3) Neither NovaStar nor the broker adequately disclosed to you the Payment on a good
 faith estimate dated no later than three days after the date on which NovaStar received
 the loan application or, if your application was received fewer than three days before you
 signed final loan documents, the date on which you signed final loan documents; and
- 15 (4) You paid the mortgage broker compensation in the form of an "origination fee" or
 "broker fee" in addition to the Payment that NovaStar paid to the broker.

23 Dkt. 177 at 9-10.

24 On April 19, 2007, the Court approved the plaintiff's proposed form of class notice but
 25 left blank the trial date, explicitly noting that the trial date would likely change and that the issue
 26

1 would be discussed at the Pretrial Conference. Dkt. 177 at 8. On April 20, 2007, the Court held
2 a Pretrial Conference at which counsel for both parties agreed that class representatives should
3 be appointed to represent class members who obtained loans funded with a NovaStar Capital,
4 Inc. (“NovaStar Capital”) line of credit and class members who obtained loans from NovaStar
5 Home Mortgage, Inc. (“NovaStar Home Mortgage”). *See* Dkt. 183. At that time, the plaintiffs
6 suggested appointment of Jennifer Teders and Stephen Bowden as class representatives. *See*
7 Dkt. 200 at 2 n.1. NovaStar Mortgage later informed the plaintiffs that Ms. Teders’s loan was
8 not funded by a NovaStar Capital line of credit, rendering Ms. Teders inadequate to represent
9 such loans. *Id.*

11 At the Pretrial Conference, the parties also discussed the pretrial schedule and proposed
12 June 11, 2007, as an alternate trial date. Counsel for the plaintiffs indicated that counsel for both
13 sides would be available June 11, 2007. Dkt. 188 at 51. Counsel for NovaStar Mortgage
14 recommended a trial date later in June or in July in light of the “additional work” associated
15 with naming two new class representatives. *Id.* at 53. In light of scheduling conflicts with the
16 two attorneys identified as trial counsel for NovaStar Mortgage, the defendant’s counsel
17 recommended that trial commence “no earlier than June 11, preferably June 18th and . . . before
18 mid July.” *Id.*

20 The Court struck the May 7, 2007, trial date and, after hearing from counsel from both
21 sides, rescheduled the trial for June 11, 2007. *See* Dkt. 183. The Court also set various pretrial
22 deadlines, including a deadline for deposing proposed additional class representatives. Dkt. 184
23 at 2. The Class Notice, listing the trial date as June 11, 2007, has been sent. Dkt. 189, 178.
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The plaintiffs moved for appointment of two new class representatives on May 1, 2007. Dkt. 192. On May 7, 2007, the plaintiffs filed an Amended Motion to Designate Two Additional Class Representatives because one of the class representatives identified in the initial motion was no longer willing or able to serve as class representative. Dkt. 200 at 2; Dkt. 201 at 1. For “logistical reasons,” the plaintiffs no longer propose Mr. Bowden as a class representative and instead offer Ralph Martinelli. Dkt. 200 at 2 n.1.

NovaStar Mortgage now moves for continuance of the trial “to a mutually acceptable date in August.” Dkt. 197 at 1. NovaStar Mortgage contends that the schedules of NovaStar Mortgage’s national counsel, Mitchel Kider, and local counsel, Sal Mungia, conflict with the June 11, 2007, trial date. *Id.* NovaStar Mortgage also contends that the possible addition of two new class representatives and joinder of correspondent lenders as defendants would require additional discovery and trial preparation that cannot reasonably be completed before June 11, 2007. *Id.* at 2.

On May 2, 2007, NovaStar Mortgage filed a Motion for Compulsory Joinder of Absent Persons as Defendants. Dkt. 195. Because the motions are noted for consideration on May 18, 2007, and concern the addition of parties and the trial schedule, the Court has considered the three motions together.

II. DISCUSSION

A. PLAINTIFFS' AMENDED MOTION TO DESIGNATE TWO ADDITIONAL CLASS REPRESENTATIVES

The plaintiffs seek appointment of Larry Brown to represent 490 class members who obtained loans through NovaStar Home Mortgage and appointment of Ralph Martinelli to

1 represent 64 class members who obtained loans funded a NovaStar Capital line of credit. Dkt.
2
3 200 at 1-2.

4 NovaStar Mortgage opposes the plaintiffs' motion for appointment of additional class
5 representatives solely on the grounds that the proffered representatives' claims are not typical of
6 the groups of class members they seek to represent. Dkt. 209 at 1.

7 The typicality requirement is fulfilled if the plaintiffs' claims are typical of the class as a
8 whole. Fed. R. Civ. P. 23(a)(3). This rule is permissive and requires that the plaintiffs' claims be
9 reasonably co-extensive with, not substantially identical to, those of absent class members.
10

11 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Typicality is satisfied if each
12 class member's claim arises from the same course of events and each class member makes
13 similar legal arguments. *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001), *cert. denied*,
14 537 U.S. 812 (2002). The purpose of these requirements is to ensure that class members'
15 interests will be fairly and adequately protected and that maintenance of a class action is
16 economical. *Id.*
17

18 First, NovaStar Mortgage opposes the motion on the grounds that the proffered
19 representatives' yield spread premium ("YSP") disclosures of 0-3% are not typical of certain
20 class members' YSP disclosures (such as 0-2%, 1-3%, and \$2,000 - \$4,000). Dkt. 209 at 9-10.
21

22 As the plaintiffs contend, the proffered representatives' claims are sufficiently typical of
23 other class members whose disclosures were provided in a range beginning with zero. In other
24 words, the Court is not convinced that "0-2%" differs from "0-3%" such that one is not
25 representative of the other.
26

1 No class representative received a good faith estimate disclosing a YSP range beginning
2 at more than zero or stated solely as a dollar figure, but NovaStar Mortgage contends that such
3 disclosures are included in the class. *See* Dkt. 27-6, Exh. 29 at 5 (Sherman good faith estimate);
4 Dkt. 27-4, Exh. 10 at 2 (Pierce good faith estimate); Dkt. 27-4, Exh. 17 at 29 (Kirby
5 good faith estimate); Dkt. 27-6, Exh. 34 at 19 (LePage good faith estimate). According to the
6 plaintiffs, no class member received such a disclosure on a *timely* good faith estimate. *See* Dkt.
7 214 at 6; Dkt. 215 at 2. The current and proposed class representatives' claims are reasonably
8 co-extensive with absent class members' claims that broker payments were inadequately
9 disclosed as a range beginning with zero, were disclosed on an untimely good faith estimate, or
10 were never disclosed at all. The Court should decline to rule that the proposed additional class
11 representatives are atypical on this basis.

14 The defendant also contends that appointment of Mr. Martinelli as a class representative
15 would be inappropriate because Mr. Martinelli received oral notice of the YSP charged on his
16 loan. Dkt. 209 at 9; Dkt. 209-4, Exh. 7 at 18. The Court has previously held that verbal
17 disclosures are arguably irrelevant to claims based upon violation of Real Estate Settlement
18 Procedures Act ("RESPA") disclosure requirements such that class certification was proper.
19 Dkt. 74. The Court has also noted that verbal disclosures may be relevant to bona fide
20 secondary market transactions not subject to RESPA. *See* Dkt. 140 at 8. The Court has not held
21 that NovaStar Capital loans, such as Mr. Martinelli's loan, are secondary market transactions.
22 The Court should therefore decline to rule that evidence of whether Mr. Martinelli received
23 verbal notice of the YSP charged on his loan renders his claim atypical of the class. The
24 Plaintiffs' Amended Motion to Designate Two Additional Class Representatives (Dkt. 200)
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1 should be granted. Accordingly, the caption in this case should be amended to read as follows:
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3 "Cameron Pierce and Patricia Pierce, husband and wife; Karen Kirby, a single woman; Gregory
4 Sherman and Paula Sherman, husband and wife; Michael LePage and Gertrude LePage, husband
5 and wife; Larry Brown, a single man; and Ralph Martinelli, a single man, on behalf of
6 themselves and a class of similarly situated individuals, Plaintiffs, v. NovaStar Mortgage, Inc., a
7 foreign corporation, Defendant." All future pleadings shall bear this caption.
8

9 **B. NOVASTAR MORTGAGE, INC.'S MOTION FOR COMPULSORY JOINDER
10 OF ABSENT PERSONS AS DEFENDANTS**

11 NovaStar Mortgage moves for joinder of correspondent lenders as necessary parties.
12 Dkt. 195. The plaintiffs contend that the motion should be denied as untimely and for failure to
13 preserve the joinder defense in the pretrial order.

14 **1. Timeliness of Motion**

15 The deadline for joining additional parties in this case was May 8, 2006, over one year
16 ago. Dkt. 21. NovaStar Mortgage first asserted joinder as an affirmative defense in its answer.
17 Dkt. 22. While the deadline for joining additional parties has passed, the joinder of parties may
18 be "feasible" even though untimely. *See Fed. R. Civ. P. 19.* The Court should therefore consider
19 the merits of the defendant's motion and decline to deny the motion as untimely.
20

21 **2. Waiver of Defense**

22 In their response, the plaintiffs contend that NovaStar Mortgage has waived the
23 affirmative defense of failure to join a necessary party because the defense was not asserted in
24 the parties' pretrial order. Dkt. 207 at 3-4. Federal Rule 16(e) governs pretrial orders and
25 provides as follows:
26

1 Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered
 2 reciting the action taken. This order shall control the subsequent course of the action
 3 unless modified by a subsequent order. The order following a final pretrial conference
 4 shall be modified only to prevent manifest injustice.

5 Fed. R. Civ. P. 16(e). Pretrial orders play an important role in limiting issues for trial:

6 [A] party need offer no proof at trial as to matters agreed to in the order, nor may a
 7 party offer evidence or advance theories at the trial which are not included in the order
 8 or which contradict its terms. Disregard of these principles would bring back the days of
 9 trial by ambush and discourage timely preparation by the parties for trial.

10 *U.S. v. First Nat. Bank of Circle*, 652 F.2d 882, 886 (9th Cir. 1981). A pretrial order has the
 11 effect of amending the pleadings and controlling the course of litigation. *Northwest Acceptance*
 12 *Corp. v. Lynnwood Equipment, Inc.*, 841 F.2d 918, 924 (9th Cir. 1988). A defendant must
 13 enumerate its defenses, even where the plaintiff bears the burden of proof. *El-Hakem v. BJY*
 14 *Inc.*, 415 F.3d 1068, 1077 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1470 (2006); *Northwest*
 15 *Acceptance Corp.*, 841 F.2d at 924 (defense waived where it was not raised in the pretrial order
 16 or before trial).

17 A pretrial order should be liberally construed to allow theories at trial that are at least
 18 implicitly included in the order. *See First Nat. Bank of Circle*, 652 F.2d at 886. A defense is
 19 preserved if the pretrial order makes some reference to the defense such that the other party
 20 should have been alerted to, and prepared for, assertion of the defense. *See El-Hakem*, 415 F.3d
 21 at 1077. In its discretion, the trial court may modify a pretrial order. *See id.*

22 The Court has not yet entered a pretrial order in this case. The parties have submitted
 23 two joint pretrial orders, and the plaintiffs have submitted their own proposed pretrial order.
 24 Dkt. 139; Dkt. 199; Dkt. 202-2 (plaintiffs' proposed pretrial order). None of the proposed
 25 pretrial orders lists failure to join necessary or indispensable parties as an affirmative defense.
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2 *See* Dkt. 139 at 4; Dkt. 199 at 2. Liberally construed, NovaStar Mortgage's factual allegations
3 in the proposed pretrial orders regarding the LePage loan were sufficient to put the plaintiffs on
4 notice of this theory. *See* Dkt. 139 at 4; Dkt. 199 at 2. In addition, the second proposed pretrial
5 order notes the pendency of the defendant's motion regarding joinder and that the defendant
6 may seek to call joined correspondent lenders to testify. Dkt. 199 at 10. The Court should
7 therefore decline to deny the motion for failure to raise the defense in the pretrial order.
8

9 **3. Joinder of Necessary Parties**

10 NovaStar Mortgage moves for joinder of correspondent lenders as necessary parties on
11 the following grounds: (1) failure to join certain correspondent lenders will prevent class
12 members from obtaining relief; (2) absence of correspondent lenders will impede the ability of
13 such lenders to "protect against a potential ruling that their disclosures were inadequate"; and
14 (3) absent correspondent lenders could be exposed to liability from NovaStar Mortgage under
15 the terms of their correspondent lender agreements. Dkt. 195 at 2.
16

17 Federal Rule 19 governs joinder of persons and provides, in relevant part, as follows:

18 Persons to be Joined if Feasible. A person who is subject to service of process and
19 whose joinder will not deprive the court of jurisdiction over the subject matter of the
action shall be joined as a party in the action if

- 20 (1) in the person's absence complete relief cannot be accorded among those
21 already parties, or
- 22 (2) the person claims an interest relating to the subject of the action and is so
situated that the disposition of the action in the person's absence may
23 (I) as a practical matter impair or impede the person's ability to protect
that interest . . .

25 If the person has not been so joined, the court **shall** order that the person be made a
party. If the person should join as a plaintiff but refuses to do so, the person may be
26 made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party

1 objects to venue and joinder of that party would render the venue of the action
2 improper, that party shall be dismissed from the action.

3

4 Fed. R. Civ. P. 19(a) (emphasis added).

5 **a. Complete Relief**

6 Federal Rule 19 provides for joinder of persons in whose absence complete relief cannot
7 be afforded: “A person who is subject to service of process and whose joinder will not deprive
8 the court of jurisdiction over the subject matter of the action shall be joined as a party in the
9 action if [] in the person’s absence complete relief cannot be accorded among those already
10 parties.” Fed. R. Civ. P. 19(a)(1). NovaStar Mortgage contends that class members cannot
11 obtain complete relief unless correspondent lenders are joined as defendants. Dkt. 195 at 5.
12 NovaStar Mortgage contends that for loans it purchased on the secondary market, it was not a
13 lender and was not required to provide a good faith estimate. *Id.* at 4. If the jury is persuaded
14 that NovaStar Mortgage was merely a purchaser of certain loans funded by other lenders and
15 that the good faith estimates on these loans were inadequate, class members may nevertheless
16 be unable to recover if NovaStar Mortgage was not the provider of the good faith estimates and
17 was under no obligation to provide good faith estimates of its own. It does not follow, however,
18 that the class would not be able to obtain complete relief without joinder of the lenders. At
19 most, NovaStar Mortgage demonstrates only that class members would not be able to obtain
20 relief from NovaStar Mortgage. That the plaintiffs’ claims against NovaStar Mortgage may
21 ultimately be unsuccessful does not require joinder of other defendants against whom the
22 plaintiffs may later successfully assert claims. The Court should decline to order joinder on this
23 basis.

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b. Prejudice to Absent Persons

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3 Federal Rule 19 provides for joinder of persons to prevent prejudice to absent persons:

4 “A person who is subject to service of process and whose joinder will not deprive the court of
 5 jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . the
 6 person claims an interest relating to the subject of the action and is so situated that the
 7 disposition of the action in the person’s absence may [] as a practical matter impair or impede
 8 the person’s ability to protect that interest.” Fed. R. Civ. P. 19(a)(2)(i).

9

10 NovaStar Mortgage contends that the ability of correspondent lenders to defend against
 11 claims that their disclosures were inadequate will be impaired if the correspondent lenders are
 12 not joined as defendants. Dkt. 195 at 6. NovaStar Mortgage contends that this case is
 13 analogous to *American Greyhound Racing, Inc.*, in which the Ninth Circuit held that certain
 14 Arizona tribes were necessary parties to a case that enjoined the Governor of Arizona from
 15 renewing gaming compacts with those tribes. *American Greyhound Racing, Inc. v. Hull*, 305
 16 F.3d 1015, 1021-23 (9th Cir. 2002) The court noted that the injunction amounted to a
 17 declaratory judgment that the tribes’ conduct was unlawful. *Id.* at 1024.

18

19 This case would not effectively rule on the legality of absent correspondent lenders’
 20 conduct. The plaintiffs do not allege that correspondent lenders provided inadequate disclosures
 21 of broker payments on good faith estimates. The plaintiffs’ claims are focused only upon the
 22 good faith estimates provided by NovaStar Mortgage and by brokers. See Dkt. 177 at 10 (The
 23 class definition reads, in part, “Neither NovaStar nor the broker adequately disclosed to you the
 24 Payment on a good faith estimate.”). Claims regarding the adequacy of correspondent lenders’
 25 good faith estimates are beyond the class definition, are not the subject of this case, and will not
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1
2 be before the jury. There being no claim that correspondent lenders' disclosures were
3 inadequate, correspondent lenders need not be joined to defend against such claims.

4 NovaStar Mortgage also contends that correspondent lenders' interests under certain
5 agreements with NovaStar Mortgage (Correspondent Lender Purchase and Sale Agreements)
6 cannot be protected absent joinder. Dkt. 195 at 6. The defendant contends that “[a]
7 determination in this action that they [correspondent lenders] violated Washington law in
8 originating the loans would necessarily oblige them to indemnify NovaStar for any losses it
9 suffered as a result of its acquisition of the loans.” *Id.* at 7; *see also* Dkt. 195-2, Ex. A
10 (representative sample agreement) at 8-9 (Correspondent lender agrees to indemnify NovaStar
11 Mortgage for losses resulting from the correspondent lender's breach of representations,
12 warranties, or covenants.). Again, whether correspondent lenders violated Washington law or
13 breached obligations owed to NovaStar Mortgage are issues beyond the bounds of this case.
14 NovaStar Mortgage fails to demonstrate that a judgment regarding the lawfulness of its own
15 conduct will determine or implicate whether correspondent lenders are required to indemnify
16 NovaStar Mortgage. NovaStar Mortgage fails to demonstrate that joinder is justified on the
17 basis that correspondent lenders would otherwise be impaired in their ability to protect their
18 interests. The Court should decline to rule that correspondent lenders are necessary parties to be
19 joined if feasible.

20
21 **c. Prejudice to NovaStar Mortgage**

22 Federal Rule 19 provides for joinder of persons to prevent prejudice to current parties:
23 “A person who is subject to service of process and whose joinder will not deprive the court of
24 jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . the
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1 person claims an interest relating to the subject of the action and is so situated that the
 2 disposition of the action in the person's absence may []leave any of the persons already parties
 3 subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations
 4 by reason of the claimed interest." Fed. R. Civ. P. 19(a)(2)(ii).

5 As the plaintiffs point out in the response, NovaStar Mortgage's motion did not seek
 6 joinder under Federal Rule 19(a)(2)(ii). Dkt. 207 at 7 n.2. NovaStar Mortgage makes such an
 7 argument for the first time in the reply, contending "correspondent lenders must also be joined
 8 because failure to do so could leave NovaStar facing inconsistent obligations." Dkt. 216 at 9.
 9 The plaintiffs have not had an opportunity to respond to this argument, and the Court should
 10 decline to consider it. *See Lentini v. California Center for the Arts, Escondido*, 370 F.3d 837,
 11 843 n.6 (9th Cir.2004) (declining to consider argument raised first in the reply).

12 **4. Third-Party Defendants**

13 In the reply, NovaStar Mortgage seeks, as an alternative to joinder of correspondent
 14 lenders as necessary parties, leave to file a complaint against correspondent parties as third-
 15 party defendants. Federal Rule 14(a) governs third-party defendants and provides, in relevant
 16 part, as follows:

17 At any time after commencement of the action a defending party, as a third-party
 18 plaintiff, may cause a summons and complaint to be served upon a person not a party to
 19 the action who is or may be liable to the third-party plaintiff for all or part of the
 20 plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain
 21 leave to make the service if the third-party plaintiff files the third-party complaint not
 22 later than 10 days after serving the original answer. Otherwise the third-party plaintiff
 23 must obtain leave on motion upon notice to all parties to the action.

24
 25 Fed. R. Civ. P. 14(a). This request was not made in the original motion, and the plaintiffs have
 26 been deprived of an opportunity to respond. The Court should therefore decline to determine

1 whether to grant NovaStar Mortgage leave to serve a summons and complaint upon
2 correspondent lenders as third-party defendants.
3

4 **C. DEFENDANT NOVASTAR MORTGAGE, INC.'S MOTION TO CONTINUE
5 TRIAL DATE**

6 Trial courts have broad discretion in deciding whether to grant or deny a request for a
7 continuance. *U.S. v. Flynt*, 756 F.2d 1352, 1358 (1985), *amended by* 764 F.2d 675 (9th Cir.
8 1985). In this case, the trial has been rescheduled three times. Dkt. 87 (by stipulation of the
9 parties); Dkt. 143 (to allow for sufficient time to provide notice to the class); Dkt. 183 (same).
10 As a threshold matter, it is extremely unfortunate and frustrating that scheduling conflicts with
11 the June 11, 2007, trial date were not resolved at the Pretrial Conference, when the trial was
12 rescheduled for the third time, and before notice was sent to class members. NovaStar
13 Mortgage offers several justifications for continuing the trial date.
14

15 First, NovaStar Mortgage asks that the Court continue the trial date so that Mr. Kider,
16 counsel for NovaStar Mortgage, may attend his son's graduation and assist his son in moving to
17 an apartment thereafter. Dkt. 197 at 8-9. This commitment predated the Court's rescheduling of
18 the trial date but was not brought to the Court's attention until the defendant moved for a
19 continuance. *See* Dkt. 198 at 2; Dkt. 197 at 14 n9. Mr. Kider did not attend the Pretrial
20 Conference because he was in Florida for an emergency meeting with another client. Dkt. 217-2
21 at 2. At the Pretrial Conference, the Court was not made aware of Mr. Kider's involvement in
22 the case or of his personal conflict with the June 11, 2007, trial date. *See* Dkt. 197 at 14 n9
23 ("When Mr. Brown attended the April 20, 2007 hearing, he was not aware of Mr. Kider's
24 personal commitment. If he had been, he would have raised it then.").
25
26

If Mr. Kider is principally responsible for defending this case, he should have attended the April 20, 2007, Pretrial Conference. *See Local Rule CR 16(m)* (“The court may, in its discretion, schedule a final pretrial conference. Counsel who will have principal responsibility for trying the case for each party shall attend.”). Counsel were aware that the Court would determine at the Pretrial Conference whether to reschedule the trial date, and counsel attending the Pretrial Conference should have been prepared to commit to a firm trial date on behalf of all participating attorneys. The Court is sympathetic to Mr. Kider’s familial commitment but is also reluctant to delay trial for matters that should have been brought to the Court’s attention earlier. The plaintiffs are amenable to recessing the trial on June 15 and 18 to partially alleviate the hardship to Mr. Kider and facilitate his involvement in the trial. Dkt. 204 at 5. Whether such recesses, or one of them, are appropriate may be addressed at the Court’s next meeting with counsel or during trial.

Second, NovaStar Mortgage contends that local trial counsel, Mr. Mungia, will not be available until August 1, 2007, “due to long-standing commitments to other cases set for trial in June and July 2007, as well as his duties as a member of the Washington State Bar Association’s Board of Governors.” Dkt 197 at 9. Mr. Mungia was not present at the Pretrial Conference because he was in depositions in New York. Dkt. 217-3 at 1. The Court was informed that Ms. Bloomfield and Mr. Brown would be trying the case on behalf of NovaStar Mortgage because Mr. Mungia had a scheduling conflict. Dkt. 188 at 53. The defendant now contends that Mr. Mungia is NovaStar Mortgage’s lead local trial counsel. Dkt. 197 at 9. If Mr. Mungia is principally responsible for defending this case, he too should have attended the April 20, 2007, Pretrial Conference. *See Local Rule CR 16(m)*. Based upon the information before it,

1
2 the Court considered the scheduling conflicts of trial counsel and selected an agreed trial date of
3 June 11, 2007. The Court should not further delay a trial in this matter.
4

5 Third, NovaStar Mortgage contends that the addition of new class representatives
6 requires additional discovery and therefore a continuance of the trial date. At the Pretrial
7 Conference, the Court considered the necessity of additional discovery relating to new class
8 representatives. Accordingly, the Court established a deadline for deposing proposed class
9 representatives and, in the absence of agreement, invited the parties to utilize conference calls to
10 chambers, or motions practice, for disputes about any additional discovery. Dkt. 188 at 55-56.

11 The proposed additional class representatives have been deposed. Dkt. 205 at 2. The
12 defendant's motion is vague as to the additional discovery it seeks. Dkt. 197 at 13-14. In the
13 reply, NovaStar Mortgage identifies specific discovery yet to be conducted: another deposition
14 of Mr. Martinelli "and other possible witnesses" after obtaining the correspondent lender's file
15 for Mr. Martinelli's loan, deposition of the defendant's secondary market expert witness by the
16 plaintiffs, deposition of the plaintiffs' damage expert, and depositions of a representative of the
17 Washington State Department of Financial Institutions and Rick St. Onge (currently scheduled
18 for the week of May 28, 2007). Dkt. 217 at 5. Because this list of outstanding discovery
19 appears in the reply, it is unclear whether the parties are in agreement as to the need for, and
20 scheduling of, additional discovery. The Court should decline to postpone the trial date to
21 accommodate additional discovery, and the parties should work together to schedule any
22 remaining discovery on an expedited basis. If the parties are unable to reach such an agreement,
23 they may seek relief or guidance from the Court through conference calls to chambers or further
24 motion practice.
25
26

Finally, NovaStar Mortgage contends that the joinder of correspondent lenders as defendants would necessitate additional discovery and a continuance of the trial date. Dkt. 197 at 12-13. The Court has determined that correspondent lenders are not necessary parties to be joined.

With the exception of the identities of the proposed additional class representatives, little has changed in this case since the Pretrial Conference. Attorneys for both sides were on notice that the trial date might be rescheduled at the Pretrial Conference. At the Pretrial Conference, the attorneys were permitted a full and fair opportunity to be heard on the question of when the trial should be set in this matter. Based upon the attorneys' input, the Court rescheduled trial for June 11, 2007, and neither party sought reconsideration of that decision. Nothing that has occurred in this case since the trial was rescheduled would warrant a trial continuance, and it appears that a trial continuance would cause some hardship to the Plaintiffs Sherman. Dkt. 206

The Court should therefore decline to reschedule the trial.

III. ORDER

Therefore, it is hereby

ORDERED that Defendant NovaStar Mortgage, Inc.'s Motion for Compulsory Joinder of Absent Persons as Defendants (Dkt. 195) is **DENIED**, Plaintiffs' Amended Motion to Designate Two Additional Class Representatives (Dkt. 200, amending Dkt. 192) is **GRANTED**, and Defendant NovaStar Mortgage, Inc.'s Motion to Continue Trial Date (Dkt. 197) is **DENIED**. It is further

ORDERED that the caption is **AMENDED** as provided herein.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

DATED this 21st day of May, 2007.

Robert J. Bryan
Robert J. Bryan
United States District Judge